

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

FIRST UNION NATIONAL	)	
BANK,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 02-05-P-H
	)	
JEFFREY W. CLARK, et al.,	)	
	)	
Defendants	)	

**RECOMMENDED DECISION**

Plaintiff First Union National Bank (“First Union”) has filed a motion requesting the Court to set a disclosure hearing and subsequently to adjudge Gardiner Savings Bank Institution (“Gardiner Savings”) a trustee for the defendants, Jeffrey and Kimberly Clark. (Docket No. 31.) First Union asserts that Gardiner Savings is liable for funds it allowed the Clarks to remove from a bank account after the service of the Court’s order of attachment and trustee process. I recommend that the Court **DENY** the motion.<sup>1</sup>

**Background**

In 1999, Jeffrey and Kimberly Clark opened a bank account at the First Union branch located in Lawrenceville, Georgia. Due to a bank error, the account was credited with a deposit of \$377,750.00 on September 17, 2001, when Jeffrey Clark deposited a check for \$37,750.00 on that date. Although Jeffrey Clark had actual knowledge of the error, he and Kimberly Clark proceeded to spend approximately \$340,000 on personal expenditures during the period from September 17, 2001 to October 17, 2001. When confronted by a bank investigator on November

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<sup>1</sup> I could find no direct authority on the issue of the extent of a magistrate judge’s post-judgment authority in this context in the absence of consent. As the issue is potentially dispositive of any claim First Union might have against Gardiner Savings, I have elected to err on the side of caution and enter a recommended decision rather than an order denying the request.

28, 2001, both Kimberly and Jeffrey Clark (“the Clarks”) acknowledged the problem and indicated that they would reimburse the bank.

First Union and the Clarks executed a settlement agreement and stipulated to the entry of judgment against the Clarks. After commencing proceedings against the Clarks, the Court granted First Union an order of attachment. (Ex. A at 2.)<sup>2</sup> First Union served trustee process on Gardiner Savings Institution (“Gardiner Savings”) on January 10, 2002 against Jeffrey W. Clark and Kimberly J. Clark in the amount of \$364,488.32. (Ex. A at 1.) Gardiner Savings responded in a timely fashion by serving a trustee disclosure on January 21, 2002 stating that it held no accounts for the Clarks. (Ex. B.) Gardiner Savings later reported that at the time of service it did hold an account for the Clarks’ business, Sugarloaf Collectibles, LLC, but not for the defendants individually. The signature card on the account states that the Clarks own 100% of Sugarloaf Collectibles, LLC. (Ex. C2.) Gardiner Savings closed the account as Jeffery Clark wrote too many checks on uncollected funds.

First Union now requests the Court to set a disclosure hearing and subsequently to adjudge Gardiner Savings a trustee for the Clarks. Although, First Union seeks to obtain approximately \$340,000 in restitution, it requests an amount Gardiner Savings had in its possession after the January 10, 2002 service date and which Gardiner Savings subsequently paid out on the Clarks’ behalf.

### **Discussion**

The central issue in this matter is whether the attachment order and the trustee process served upon Gardiner Savings encompasses the Sugarloaf Collectibles, LLC account at Gardiner Savings. The trustee summons issued January 10, 2002, informs Gardiner Savings that it is summoned as trustee in an action brought before this Court and requires Gardiner Savings to

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<sup>2</sup> The exhibits cited herein are attached to Docket No. 35.

serve “a disclosure under oath of what cause, if any [it] [has], why the execution issued upon such judgment as [First Union] may recover against the said defendant in this action if any, should not issue against his goods, effects or credits in [Gardiner Savings’s] hands and possession as trustee of said defendant to the value of \$364,488.32... .” (Ex. A at 1.) The attachment order in part states that “[a]ttachment, including attachment on trustee process, is issued against the defendants, Jeffrey W. Clark and Kimberly J. Clark, in the amount of \$364,488.32.” (Ex. A at 2.) In response to the trustee summons, Gardiner Savings served a timely disclosure stating that it had no accounts of the defendants. When the trustee summons was served however, Gardiner Savings did have an account for the defendants’ business, Sugarloaf Collectibles, LLC. Gardiner Savings asserts this account is a commercial account under the business name only, whereas First Union asserts this is a joint account held by Sugarloaf Collectibles, LLC and the Clarks.

Pursuant to 14 M.R.S.A. § 2603, “[s]ervice on the trustee binds all goods, effects, or credits of the principle defendant entrusted to and deposited in his possession... .” The trustee summons and the attachment order only name Jeffrey and Kimberly Clark; it does not name Sugarloaf Collectibles, LLC. In Maine, property “transferred to or otherwise acquired by a limited liability company” becomes property of the company. See 31 M.R.S.A. §681(1). “A member has no interest in specific limited liability property.” Id. Thus, although the Clarks were the sole owners of Sugarloaf Collectibles, LLC, the money in the Sugarloaf account was the property of the entity, not the Clarks.<sup>3</sup> When First Union sought an attachment order and trustee process, it may have been able to overcome this obstacle by including the name of Sugarloaf Collectibles, LLC on the request and showing the Court that Gardiner Savings holds

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<sup>3</sup> Although it is not expressly stated in the record, Sugarloaf Collectibles, LLC, appears to have been established in Maine. (See Jeffrey Clark Dep. attached to Docket No. 31, Ex. F at 17-22.)

the funds under a fraudulent conveyance pursuant to 14 M.R.S.A. § 2629. This provision states that if an “alleged” trustee has in his possession goods, effects, or credits of the principle defendant that he holds under a fraudulent conveyance he may be adjudged a trustee. See 14 M.R.S.A. § 2629.

Instead, First Union attempts to reach the Sugarloaf Collectibles account by means of a different avenue. It asserts that the account was a joint account rather than a commercial account solely in the name of Sugarloaf Collectibles. As support, it first points to the fact that the January 31, 2002 account statement issued by Gardiner Savings lists Sugarloaf Collectibles, LLC, as well as the names of Jeffrey W. Clark and Kimberly J. Clark. (Ex. C4 at 1.) Second, First Union points to the payees named on the checks drawn from the account. As the payees include Winners Off Track Betting, creditors of the Clarks, and Jeffrey Clark, First Union finds that the funds in the account were used for the Clarks’ personal expenses. (Ex. C4 at 5-6.) Third, First Union finds support for its proposition in Jeffrey Clark’s statement that he used the account for personal expenses. Armed with this as support, First Union argues that Gardiner Savings failed to disclose that it treated the account as a joint account of Sugarloaf Collectibles, LLC and the individual defendants, and failed to stop or scrutinize withdrawals from that account after the January 10, 2002 service of trustee process.

However, the parties’ exhibits show that the account was a commercial account in the name of Sugarloaf Collectibles, LLC and not a joint account. Although the January 31, 2002 bank statement that First Union refers to contains the business name and the Clarks’ names, directly below the names are the words “commercial checking.” (Ex. C4 at 1.) The following three pages contain the heading “commercial checking.” (Ex. C4 at 2-4.) Moreover, the signature card clearly designates the type of account as a business account in the name of

Sugarloaf Collectibles, LLC only. (Ex. C1 at 1.) The card lists two types of accounts, consumer and business, and under each account type appear different account options. No areas are marked under the “consumer” title, not even the box indicating a joint account. (Id.) Under the “business” title, the box next to “other” is checked and “LLC” was hand-written on the space provided. (Id.) The Clarks indicated on these cards that they are the two owners of the corporation and they executed the signature card reporting to be acting on behalf of the business entity. (Id.) Furthermore, the corporate deposit resolution, a form completed during the process of opening the account, shows that Gardiner Savings was being designated as a depository for “corporate funds” only. (Ex. C2.) The corporate deposit resolution was executed by the Clarks as owners and in their official capacities on behalf of the corporation of Sugarloaf Collectibles, LLC. (Id.) The January 31, 2002 bank statement, the signature card, and the corporate deposit resolution show that this account is a commercial account, not a joint account, under the Sugarloaf Collectibles, LLC name only.

There is no evidence that supports First Union’s assertion that Gardiner Savings treated the account as a joint account.<sup>4</sup> That the Clarks drew checks from the account for personal expenses does not demonstrate that Gardiner Savings treated the account as a joint account as First Union asserts. The evidence shows that Gardiner Savings opened the account as a commercial account, not as an individual or joint account, and had the necessary documents completed and signed as a commercial account under the name of Sugarloaf Collectibles, LLC. As the attachment order and the trustee process does not name Sugarloaf Collectibles, LLC and as Gardiner Savings has no accounts in the name of Jeffrey or Kimberly Clark, a disclosure

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<sup>4</sup> The parties have agreed that an evidentiary hearing would have produced no additional documents or testimony and have accordingly indicated that they did not wish to have such a hearing. [See Docket No. 38.]

hearing is not warranted. Gardiner Savings should not be adjudicated as a trustee of an account for the Clarks.

### Conclusion

I recommend the Court **DENY** First Union's motion as the trustee summons and attachment order name only Jeffrey and Kimberly Clark and therefore do not apply to the commercial account in the name of Sugarloaf Collectibles, LLC.

### NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated July 17, 2002

CLOSED MAGREC  
PORTLD STNDRD

U.S. District Court  
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 02-CV-5

FIRST UNION NATIONAL v. CLARK, et al  
Assigned to: JUDGE D. BROCK HORNBY  
Demand: \$0,000  
Lead Docket: None  
Dkt# in other court: None

Filed: 01/07/02  
Jury demand: Plaintiff  
Nature of Suit: 190  
Jurisdiction: Diversity

Cause: 28:1332 Diversity-Breach of Contract

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KIMBERLY J CLARK  
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JOHN F. BARNICLE, JR.  
(See above)  
[COR LD NTC]

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